SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAR 2 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM
1972

NO. 71-1116

JOSE TORRES CRUZ and RUBEN ALBERTO VEGA Y MERCED, *Petitioners,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES N. EGAN
60 Washington Street
Hartford, Connecticut
Attorney for Petitioners.

TABLE OF CONTENTS

	Page
Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit	1
Opinion Below	1
Jurisdiction	1
Question Presented	2
Constitutional Provisions Involved	2
Statutes Involved	2
Statement of the Case	2
Reasons for Granting the Writ	3
I. The Trial Court's conduct of the case manifested such racial prejudice as to deprive the defendants of a fair trial	3
Conclusion	10
Appendix	11

TABLE OF CITATIONS

PAGE

Cases

U. S. v. Curcio, 279 F2d. 681 (2d. Cir. 1960) 3, 14

U. S. v. Frascone, 299 F2d. 824 (2d. Cir. 1962) 3, 14

U. S. v. Salazar, 293 F2d. 442 (2d. Cir. 1961) 8

Statutes

Title 26, United States Code; Section 5861 (d.) 18

Rules of Criminal Procedure, 52 (b) 18

Miscellaneous

CARNEY, JAMES T. "The Constant Factor: Judicial Review of the Fact Finding Process in the Circuit Courts of Appeal." Unpublished Senior Studies, Thesis Yale Law School, 1967 9

KALVEN and ZIESEL, *The American Jury* (1966) 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. .....

JOSE TORRES CRUZ and RUBEN ALBERTO VEGA Y MERCED, *Petitioners,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Jose Torres Cruz and Ruben Alberto Vega Y Merced petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Second Circuit entered in this case on February 2, 1972.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App. A) is not yet officially reported.

JURISDICTION

Jurisdiction to review by writ of certiorari the judgment and decision of the United States Court of Appeals for the Second Circuit, entered February 2, 1972 (App. B) is invoked under the provisions of 28 U.S.C. #1254 (1).

QUESTION PRESENTED

Did the trial court's conduct of the case manifest such racial prejudice as to deprive the defendants of a fair trial?

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section I, Clause I and Amendment V of the United States Constitution are set forth in Appendix C.

STATUTES INVOLVED

The relevant portion of the Internal Revenue Code, as amended (26 U.S.C.) and the Federal Rules of Criminal Procedure, are set forth in Appendix D.

STATEMENT OF THE CASE

About 6:00 p.m. on July 30, 1971, a day of civic disturbances in Hartford, defendant left his home at 48 W. Avon to go shopping on N. Main St. with his wife and two children, his younger brother (Jose Domenico Torres) and his older brother (Jose A. Torres) and the latter's wife and child. While returning home from shopping, the family stopped briefly at 2411 Main St. to invite some friends over to their house the next Sunday to celebrate Cruz's daughter's birthday. After leaving their friends, the family approached the intersection of Main and Canton where their vehicle was stoned by a mob. Defendant Ruben Vega, who had been standing with his wife and Evelyn Rodrigus on the front porch of their dwelling at 1731 Main, observed the stoning and recognized the vehicle. Concerned for the safety of his friends, Vega hailed the Cruz vehicle as it passed through the intersection and offered to take the family into his home. Cruz stopped the car in front of the house; his wife, his two children, his older brother (Jose A. Torres) and the latter's wife and child got out and went into the house and upstairs to the Vega apartment with Mrs. Vega. Vega remained outside to wait for Cruz and his younger

brother to park the car in a lot in back of the house. While Vega was waiting on the porch, he was arrested by a police officer who believed that he was one of the two men who had thrown a fire bomb at a police patrol car just a few minutes before. When Cruz and his younger brother parked the car and entered the house, they were also arrested by the police who believed that Cruz was the other of the two men involved in the fire bombing incident.

On December 14, 1970, the defendants were indicted by the Grand Jury for a violation of 26 U.S.C. 5861 (d). Defendants were tried by the District Court for the District of Connecticut, Murphy, J., presiding. During the two and a half day trial, the police officers testified that they had seen the defendants throw the fire bombs, that they chased the defendants into the building at 1731 Main St., and that they had seized the defendants there at gunpoint. The jury, disregarding the defense testimony and crediting the policemen's story, found the defendants guilty. The District Court entered judgment accordingly and the Second Circuit Court of Appeals affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

I. The Trial Court's conduct of the case manifested such racial prejudice as to deprive the defendants of a fair trial.

It is the position of the petitioners that the writ of certiorari should be granted because the Second Circuit has sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision. It has always been recognized that a trial court is obligated to conduct itself in a fair and impartial manner.

In *U. S. vs. Frascone* 299 F2d. 824, 829 (2d. Cir. 1962), the court declared, "A trial judge must always remember that he is the personification of our legal system in the eyes of all who are present in his courtroom, and, therefore, it

behooves him to act with dignity at all times." In *U. S. vs. Curcio* 279 F2d. 681, 682 (2d. Cir. 1960), the court pointed out, "It is one of the glories of federal criminal law administration that a district judge is more than moderator or umpire and has an active responsibility to see that a criminal trial is fairly conducted. Hence he will often have a duty to participate actively to that end; *but he must not interfere for a merely partisan purpose or permit even the appearance of such interference. Nor should he take the course of the trial out of the hands of competent attorneys, nor show by any interjected remarks, his own view of the evidence.*" (emphasis supplied).

Unfortunately, the trial court did not adhere to the proper standards of judicial conduct in this case. Rather, in the course of a two and a half day trial, it demonstrated its prejudice against the defendants in particular, and Puerto Ricans in general, by repeatedly interrupting and belittling defense counsel, by making snide comments about the defendants' names and the inability of the defendants' witnesses to understand English, and by so distorting a crucial item of the defendants' story in summation so as to make the jury's guilty verdict almost inevitable.

The extent to which the trial court interrupted and disparaged the inexperienced defense counsel is evidenced by the following comparison. An examination of the first thirty pages of the transcript which covers the prosecution's direct evidence shows that the trial court intervened only once to interrupt the direct examination of the Assistant United State's Attorney. The remaining portions of the transcript indicate almost no other occasions on which the trial court intervened during an examination or cross-examination by the prosecutor. On the other hand, an examination of the first hundred and twenty pages of transcript indicate that the trial court interrupted the defense counsel on a total of seventeen occasions. On a number of these occasions, the trial court engaged in extended colloquy with defense coun-

sel. The effect of such frequent interruptions was to hamper the defense counsel's conduct of the trial by breaking his chain of thought and disrupting the presentation of his case. Moreover, the content of the trial court's comments clearly reflected contempt for the defense counsel's ability and constituted a deliberate attempt to denigrate the novice attorney.

Mr. Cardwell: "Can I ask you why you didn't check for odor of gasoline on the hands of Mr. Vega?"

The Court: "Do you want his permission or do you ask the question why?"

Mr. Cardwell: "I'm asking him."

The Court: "You said, 'Can I ask you?' "Do you want to ask the question why?" (T-54)

* * * *

Mr. Cardwell: "I suppose, Your Honor, that they had—"

The Court: "Don't suppose. You're entitled to ask questions and he said do you know what all of the people thought that night at all?" (T-69, 70)

* * *

Mr. Cardwell: "May I have just a minute, Your Honor?"

The Court: "We're past the minute now." (T-71)

* * * *

Mr. Cardwell: "It would take you five minutes."

The Court: "Don't repeat everything he says, counsel, we have a man taking it down with a machine." (T-89)

Disparagement of the defense counsel by the trial court had the effect of demeaning before the jury not just the attorney but also his principals as well.

However, the trial court manifested more than vicarious prejudice against the defendants. When Jose Antonio Torres was testifying, the trial court interrupted his testi-

mony about the identity of the individuals who participated in the shopping expedition to engage in the following colloquy:

The Court: "Let's see now. The brother that was driving, what was his name?"

The Witness: "Jose Torres."

The Court: "The older brother who was sitting some place else, what was his name?"

The Witness: "Jose D. Torres. We are all named Jose."

The Court: "That's part of the problem." (T-2:54)

The effect of this unnecessary comment from the trial court was to ridicule the defendant and his family for their native custom of giving all males in the family the same first name and thus to emphasize to the jury the fact that the defendants and their witnesses were not native born Americans but rather aliens — Puerto Ricans.

Shortly after this incident, the trial court again manifested racial sentiment. When Mrs. Cruz took the stand to testify on behalf of her husband, the trial court questioned her (as it questioned Jose Domenico Torres (T-3) and Jose A. Torres (T-2:49) about her difficulty in comprehending and speaking English. After Mrs. Cruz stated that she understood English "A little. Not too much." (T-2:92) she responded to several questions in English without the aid of an interpreter. At this time the following colloquy occurred between the trial court and counsel in the full hearing of the jury:

The Court: "She seems to answer your question without the aid of an interpreter."

Mr. Cardwell: "I think she's just a little nervous, Your Honor."

The Court: "Maybe that's a good way to learn English." (T-2:92)

By suggesting that Mrs. Cruz could learn English if she was nervous enough in the manner of the famous English tourist who had insisted that foreigners could understand English if he spoke loudly and firmly enough, the trial court once again emphasized the fact that Mrs. Cruz, the defendant, and all the defense witnesses were outlanders — aliens who spoke a different tongue. The trial court also indicated its distrust of her claim to speak and understand English imperfectly.

A final manifestation of the trial court's racial bias occurred in the course of its charge to the jury, which he charged.

> "The testimony in this case, ladies and gentlemen, presents a very, very sharp issue of fact, and it must be obvious to you that two entirely different versions of a factual situation cannot both be true. In substance, it's the Government's claim that these two defendants were each involved in the possession of an unregistered destructive device in the late hours of July 30 last year, and each defendant's claim is that they had nothing to do with any destructive device or fire bomb, *but were arrested by the police without rhyme or reason.* So that you can see that one of the principal issues in the case is where does the truth lie."
>
> (Charge to the Jury — 6-7)

The trial court's statement that the defendants claimed that the police arrested them "without rhyme or reason" was a grossly inaccurate statement. The defendants at no time attempted to explain specifically why the police had arrested them; indeed, any testimony on their part as to the possible motivations of the police could properly have been objected to as speculative and conjectural. However, *the absence of an explanation as to their sudden arrest hardly amounted to a claim by them that they were arrested without rhyme or reason.* Indeed, their counsel seems to have suggested at one point that the arrest was the result

of a mistake by white police officers who on a dark night would tend to have difficulty in distinguishing one Puerto Rican from another. (Charge to the Jury — 22-24)

By characterizing the defendants' account of the arrest as being one without "rhyme or reason", the trial court undermined the credibility of the defense since a contention that the police acted without "rhyme or reason" seems almost inherently unbelievable because the police, while they may act from mistake, do not act senselessly.

In *U. S. vs. Salazar*, 293 F2d. 442 (2d. Cir. 1961) the defendant, accused of conspiring to sign others' name to Civil Service examinations, claimed that several of his fellow employees were lying about him and that a governmental handwriting expert was confused. This defense was on its face credible. However, the trial court attributed to Salazar not this story but rather "the argument that the Post Office Department and the United States Attorney's Office had joined together to frame him." (at 444) By so doing, the Second Circuit ruled, the "judge made Salazar's eventual fate at the hands of the jury almost inevitable." (at 444) *Here, the mischaracterization of the defense had much of a prejudicial effect as it did Salazar, and denied to the defendants the fair and impartial trial to which they were entitled under the law.*

Although the relatively inexperienced defense counsel did object to the court's charge but made no objection to manifestation of the trial court's racial and ethnic prejudice, the conduct of the trial court was so improper as to necessitate the invocation of Rule 52(b) of the Federal Rules of Criminal procedure. Although it is difficult to convey from a printed record that actual atmosphere of a trial, it must be emphasized that this case was one permeated with racial undertones. The circumstances surrounding the fire bombing were racial in nature since the fire bombings occurred in the midst of a riot by Puerto Ricans against the white Establishment. The fire bombings were racial in nature

since they constituted an attack by Puerto Ricans on white police officers. Finally the essential issue at the trial involved a conflict between the testimony of white prosecution witnesses and Puerto Rican defense witnesses. Under such circumstances manifestation of prejudice by the trial court is bound to have a significant impact on the jury and to necessitate reversal.

The extent to which the trial court indulged its bias led even the Second Circuit to criticize its conduct. The Second Circuit termed the trial court's remark about Mrs. Cruz's inability to speak English "unnecessary." It declared that "it would have been preferable for the court in several instances to have exercised greater restraining . . ." in its intervention. Nevertheless, it concluded that "an examination of the record of the whole trial . . . does not reveal interference by the court so extensive as to require reversal." In seeking a writ of certiorari, the petitioners submit that the instant case involves more than just isolated abuse of justice carelessly passed over by an overburdened appellate court — although such an abuse of justice as occurred here would justify the granting of the writ. Rather, petitioner seeks to call to this court's attention a general practice the Court of Appeals by the Second Circuit in respect to a judicial misconduct — a pattern of behavior which creates injustice in many cases. This pattern is set forth by James T. Carney, "The Constant Factor: Judicial Review of the Fact Finding Process in the Circuit Courts of Appeal," (Unpublished Senior Studies Thesis, Yale Law School, 1967). The author notes that during the period covered by the study (September 1960 through August 1964) the Second Circuit reversed only two cases solely because of misconduct; it reversed another two cases on several grounds including judicial misconduct. In some thirteen other cases, the Second Circuit paid cognizance to misconduct on the part of the trial court, expressly or impliedly rebuked it, but refused to reverse, thus following the pattern evidenced in this case. The studied refusal of the

Court of Appeals for the Second Circuit to exercise supervisory authority over the district courts under it has had a deleterious impact on the general administration of justice since trial judges have been in effect left free without fear of restraint to so interject themselves into the conduct of a case as to preclude a fair trial. Such intervention or demonstration of bias by a trial court has a major impact upon the minds of the jurors who although customarily instructed that they and not the court are to be the judges of the fact and that they should not be influenced by anything which the court does which might give them an impression as to the court view of the fact, nevertheless" . . . are both interested in and skillful in reading his [the judge's] reaction." Kalven and Ziesel, *The American Jury* (1966), 418 Fn. 3.)

CONCLUSION

On the basis of all the foregoing, Petitioners submit that the Court grant this Petition for Writ of Certiorari.

James N. Egan
60 Washington Street
Hartford, Connecticut

Attorney for Petitioners.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 414—September Term, 1971.

(Argued January 6, 1972 Decided February 2, 1972.)

Docket No. 71-1857

UNITED STATES OF AMERICA,

Appellee,

v.

JOSE TORRES CRUZ and RUBEN ALBERTO VEGA Y MERCED,

Appellants.

Before:

FRIENDLY, *Chief Judge,*
MOORE and OAKES, *Circuit Judges.*

Appeal from judgments of the United States District Court for the District of Connecticut, Thomas F. Murphy, *Judge*, convicting appellants, after a jury trial, of possession of an unregistered firearm in violation of 26 U.S.C. §5861(d).

Judgments affirmed.

JAMES N. EGAN, Hartford, Conn., *for Appellants.*

RANDOLPH C. ROEDER, Assistant United States Attorney, Hartford, Conn. (Stewart H. Jones, United States Attorney, District of Connecticut, on the brief), *for Appellee.*

PER CURIAM:

Appellants ask us in their brief on appeal to characterize as plain error, Fed. R. Crim. P. 52(b), two comments by the court occurring in the course of a 2½-day trial. The comments[1] are said to demonstrate the court's "racial prejudice against the defendants in particular and Puerto Ricans in general" and to have deprived appellants of a fair trial. In a supplementary brief submitted at argument and on oral argument appellants additionally urge us to note as plain error 17 "interruptions" by the trial judge of defense counsel, said to have broken "counsel's train of thought" and tended "to affect a jury's evaluation of his ability" or to have disparaged the defense attorney with subsequent prejudice to the accused.

A careful reading of the entire transcript of the trial indicates that appellants' charges are unfounded. In context the two comments referred to in footnote 1 herein were innocent. Three witnesses as well as one of the defendants were named Jose, and two of them had the last name of Torres. The first comment complained of was clarificatory only. While the second comment—"Maybe that's a good way to learn English"—was unnecessary, we do not treat it as manifesting racial bias since it appears that the witness was answering questions in English without the aid of the interpreter. An examination of the record of the whole trial, *United States v. Switzer*, 252 F.2d 139 (2d Cir.),

---

[1] The Court: Let's see now. The brother that was driving, what was his name?

The Witness: Jose Torres.

The Court: The older brother who was sitting some place else, what was his name?

The Witness: Jose D. Torres. We are all named Jose.

The Court: That's part of the problem.

* * *

The Court: She seems to answer your question without the aid of an interpreter.

Mr. Cardwell: I think she's just a little nervous Your Honor.

The Court: Maybe that's a good way to learn English.

cert. denied, 357 U.S. 922 (1958), does not reveal interference by the court so extensive as to require reversal. *See United States v. Tyminski,* 418 F.2d 1060, 1962 (2d Cir. 1969), *cert. denied,* 397 U.S. 1075 (1970). Moreover, the court's charge carefully and properly pointed out that comments or questions by the court were not to be construed as in any way expressing any opinion or view on the part of the court whatsoever. The charge was not excepted to in any way, and examination of it reveals only fairness and objectivity on the part of the trial judge.

As to the interruptions of defense counsel, it is evident from an inspection of the whole record that counsel invited many of these by overly repetitious and extended cross-examination, questions asked in improper form, or by repetition of a witness's previous answer in putting the next question. We do, however, endorses the A.B.A. Advisory Committee's standards for the rendering of criminal justice:

> The trial judge should be the exemplar of dignity and impartiality. He should exercise restraint over his conduct and utterances. He should suppress his personal predilections, and control his temper and emotions. He should not permit any person in the courtroom to embroil him in conflict, and he should otherwise avoid conduct on his part which tends to demean the proceedings or to undermine his authority in the courtroom. When it becomes necessary during the trial for him to comment upon the conduct of witnesses, spectators, counsel, or others, or upon the testimony, he should do so in a firm, dignified and restrained manner, avoiding repartee, limiting his comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues.

A.B.A. Project on Standards for Criminal Justice, Advisory Committee on the Judge's Function, *Standards Relating to the Judge's Role in Dealing with Trial Disruptions,* Standard B.1, at 6 (Advance Rep. Tent. Draft May, 1971).

See also United States v. *Frascone*, 299 F.2d 824, 829 (2d Cir.), *cert. denied*, 370 U.S. 910 (1962); *United States* v. *Curcio*, 279 F.2d 681, 682 (2d Cir.), *cert. denied*, 364 U.S. 824 (1960). While it would have been preferable for the court in several instances to have exercised greater restraint,[2] it is not as if counsel were lacking in experience at the criminal bar; that is to say, he could well have avoided the repetitiousness that helped to bring on the court's comments. Moreover, on various occasions throughout the record it is evident that the court leaned over backward to make certain that appellants' points were brought out and that even where counsel's questions were obfuscatory the jury would be able to perceive the object of his interrogation.[3]

Appellants denied any responsibility whatsoever for the

---

[2] Q. Can I ask you why you didn't check for odor of gasoline on the hands of Mr. Vega?
The Court: Do you want his permission or do you ask the question why?
Mr. Cardwell: I'm asking him.
The Court: You said, "Can I ask you?" Do you want to ask the question why?
Mr. Cardwell: Yes.
The Court: Why did you not check?

* * *

Mr. Cardwell: I suppose, Your Honor, that they had—
The Court: Don't suppose. You're entitled to ask questions and he said do you know what all of the people thought that night at all?

* * *

The Court: Don't repeat everything he says, counsel. We have a man taking it down with a machine.
Mr. Cardwell: I want to make certain—
The Court: I wonder about what the jury is concerned with. If they can't hear it, they'll let me know.

* * *

Q. How far behind the cruiser were you?
A. I'd say fifty to seventy feet.
Q. Fifty to seventy feet. I didn't intend to repeat that, Your Honor.
The Court: Try not to again.

[3] *E.g.*:
Q. [Mr. Cardwell] And is it fair to say that if they were going to throw firebombs at the cruiser they would be observing it coming down the street from the north?
Mr. Mac Buckley: Objection, Your Honor. He does not know what they saw.
The Court: I think he did say on direct and on redirect they didn't observe him.
Mr. Mac Buckley: They didn't look at the car?
Mr. Cardwell: Counsel asked him which way they were looking.
The Court: Would you agree with counsel that it was fair to say that they were looking at you?
The Witness: At us or at the cruiser.

throwing of two Molotov cocktails or firebombs at a police car in the course of a June 30, 1970, civil disturbance in Hartford, Connecticut; they denied even seeing the firebombs thrown. The two arresting officers who were seated in an unmarked vehicle following the police car at which the firebombs were thrown testified that they never took their eyes off the two defendants from the time when they were first seen throwing the firebombs to the time of arrest a few moments later, on pursuit into a house at the scene. There was plainly sufficient evidence to sustain the convictions for violation of 26 U.S.C. §5861(d)—possession of an unregistered firearm.

Judgments affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 414—September Term, 1971.

(Argued January 6, 1972 Decided February 2, 1972.)

Docket No. 71-1857

UNITED STATES OF AMERICA,

Appellee,

v.

JOSE TORRES CRUZ and RUBEN ALBERTO VEGA Y MERCED,

Appellants.

Before:

FRIENDLY, *Chief Judge,*

MOORE and OAKES, *Circuit Judges.*

Appeal from judgments of the United States District Court for the District of Connecticut, Thomas F. Murphy, *Judge,* convicting appellants, after a jury trial, of possession of an unregistered firearm in violation of 26 U.S.C. §5861(d).

Judgments affirmed.

JAMES N. EGAN, Hartford, Conn., *for Appellants.*

APPENDIX C

United States Constitution

Article III

Clause 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their services, a Compensation, which shall not be diminished during their continuance in Office.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

Internal Revenue Code

26 U.S.C.

5861

Prohibited acts

It shall be unlawful for any person —

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.

Federal Rules of Criminal Procedures

"(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
APR 11 1972
MICHAEL RODAK, JR., CLERK

No. 71-1116

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOSE TORRES CRUZ AND RUBEN ALBERTO VEGA Y MERCED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1116

JOSE TORRES CRUZ AND RUBEN ALBERTO VEGA Y MERCED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial by jury in the United States District Court for the District of Connecticut, petitioners were convicted of possessing unregistered firearms, in violation of 26 U.S.C. 5861(d). Each was sentenced to imprisonment for a period of five years. The court of appeals affirmed (Pet. App. A).

At approximately 11:00 p.m. on July 30, 1970, a police cruiser was patrolling in an area of Hartford,

Connecticut, which was temporarily blocked off from regular traffic because of a civil disturbance. An unmarked police vehicle, containing four officers, was following with its lights off. As the cruiser proceeded in a southerly direction a dark-haired male of Latin appearance threw a flaming object toward the cruiser. The object missed and fell in the street behind the cruiser, immediately covering the surrounding area with flames. A second individual, also of Latin appearance, wearing a gray checkered shirt, threw a similar object, which likewise fell behind the cruiser and extended the flaming area in the street. A young man ran into the street and threw trash on the flames. No other persons were present on the street or sidewalk (I Tr. 13-14, 18-23, 26, 30-31, 77-81, 102-106; III Tr. 3-11).

The unmarked police vehicle was brought to a stop on the right side of the street. Two officers pursued and caught the individual who had placed trash on the fire; he proved to be a juvenile. The two men on the west side seen throwing the missiles took flight, running up the front steps and into a house, pursued by the other two officers. They were caught just inside the front door and placed under arrest (I Tr. 23, 25-26, 82, 107; II Tr. 13). One was petitioner Vega, the one wearing the checkered shirt was petitioner Cruz. Both arresting officers stated that they had petitioners in full view from the time the missiles were thrown until they were caught. Cruz had the odor of gasoline on his hands. Both of the arresting officers were positive in their identifications of peti-

tioners (I Tr. 25, 27, 81-83), as were the other two officers (I Tr. 106, 108; II Tr. 11). No fire bombs were registered to petitioners in the National Firearms Register (I Tr. 125-129).

Petitioners contend, among other things, that the trial court's conduct of the case manifested such racial prejudice as to deprive them of a fair trial. The court of appeals carefully reviewed the record and found this and other charges to be unfounded. There is no occasion for further review by this Court.

1. It is claimed that reversible error occurred because of the trial judge's repeated interrogation of defense counsel. However, examination of the individual rulings complained of (Pet. 5) reveals none where it can be said that the court was in error. The court of appeals properly concluded that the trial court "leaned over backward to make certain that appellants' points were brought out and that even where counsel's questions were obfuscatory the jury would be able to perceive the object of his interrogation" (Pet. App. A 14). The judge in a federal court is more than a mere moderator, he is the governor of the trial for the purpose of assuring its proper conduct.

2. The first defense witness was Jose A. Torres, brother of petitioner Jose Torres Cruz (II Tr. 48). Describing the seating arrangement of his family in a car earlier in the evening, this witness said that his brother was driving. The court asked the name of this brother, as the witness had another brother in the back seat. The witness replied, "Jose D. Torres.